Balakong Development Sdn Bhd v Loo Kok Yuen & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO S2-25-26 OF 1998
KAMALANATHAN RATNAM J
16 APRIL 1999

Land Law *— Restraints on dealings — Caveats — Caveatable interest — Whether caveator had caveatable interest in land — No concluded contract to purchase land — Whether caveator had changed intention to purchase shares in plaintiff company instead*

In this application, the plaintiff applied for the removal of the defendant's caveat entered upon the plaintiff's land ('the property'). The defendants had paid RM18,250 to one Siew Hoong Chong, one of the directors of the plaintiff, allegedly towards the sale of the property. The plaintiff contended that the sum was intended for the purchase of shares of the plaintiff. In support of its contention, the plaintiff entered as exhibits two letters dated 3 January 1995. For the defendants, two letters supporting the defendants' position, respectively dated 12 October 1994 and 6 April 1995, were entered as exhibits. However, no sale and purchase agreement in respect of the land was produced in evidence.

Held:

(1) The defendants do not have a caveatable interest in the property. There was never a concluded contract for the sale of the property. Further, there is no evidence that the said Siew Hoong Chong was authorized by a resolution to commit the plaintiff into a sale of the property. Also, the defence's submission, that even though the intention of purchasing the property had changed, it did not change their intention to purchase the property, was rejected as there had been so many variations of intention (see p 652D–I).

(2) Since the defendants had failed to commence proceedings timeously to enforce what they contended to be their right, it would be totally unjust to permit the caveat to remain on the register, thereby preventing the plaintiff from dealing with the property (see p 653B–C).

[Bahasa Malaysia summary

Dalam permohonan ini, plaintif telah memohon untuk mengketepikan kaveat defendan yang dimasukkan ke atas tanah plaintif ('harta tersebut'). Defendan-defendan telah membayar RM18,250 kepada suatu Siew Hoong Chong, salah satu pengarah-pengarah plaintif tersebut, dan dikatakan untuk pembelian harta tersebut. Plaintif telah menegaskan bahawa jumlah tersebut adalah diniatkan untuk pembelian saham plaintif. Dalam menyokong penegasannya, plaintif telah memasukkan sebagai ekshibit dua pucuk

surat bertarikh 3 Januari 1995. Bagi defendan-defendan, dua pucuk surat untuk menyokong kedudukan defendan-defendan masing-masing bertarikh 12 Oktober 1994 dan 6 April 1995, telah dimasukkan sebagai ekshibit. Namun begitu, tiada perjanjian jual beli berkenaan tanah telah dikemukakan sebagai keterangan.

Diputuskan:

(1) Defendan-defendan tidak mempunyai kepentingan yang boleh dikaveatkan di atas harta tersebut. Tidak terdapat suatu kontrak untuk penjualan tanah tersebut. Selanjutnya, tidak terdapat keterangan bahawa Siew Hoong Chong telah diberi kuasa oleh resolusi untuk mengikat plaintif ke dalam suatu penjualan tanah. Lagi, hujahan pembelaan, bahawa walaupun niat untuk membeli tanah tersebut telah berubah, ia tidak mengubah niat mereka untuk membeli tanah tersebut, telah ditolak oleh kerana terdapat banyak perubahan niat (lihat ms 652D–I).

(2) Oleh kerana defendan-defendan telah gagal untuk memulakan prosiding-prosiding pada masa yang tepat untuk menguatkuasakan apa yang ditegaskan sebagai hak mereka, adalah menjadi tidak adil sepenuhnya untuk membenarkan kaveat untuk kekal di dalam daftar, yang dengan itu akan mencegah plaintif daripada menguruskan tanah tersebut (lihat ms 653B–C).]

Notes

For cases on whether a caveator had caveatable interest in land, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2366–2368.

Cases referred to

Abdul Rahim bin Syed Mohd v Ramakrishnan Kandasamy (Wan Ahmad Azlan bin Wan Majid & Anor, Interveners) and another action [1996] 3 MLJ 385 (refd)

Chai Kim Chong v Barnwood Sdn Bhd [1994] 2 MLJ 56 (refd)

Hew Sook Ying v Hiw Tin Hee [1992] 2 MLJ 189 (refd)

Tsen Kyun Tshin v Lee Tse Khiong[1998] 4 MLJ 319 (refd)

Wu Su Chen (sole executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin [1997] 2 MLJ 487 (refd)

Legislation referred to

National Land Code 1965 ss 323(1)(a), 327(1)

Yap Mow Jiun (*Chung, Huang & Khalid*) for the plaintiff.
Amir bin Nordin (*Khairuddin Ngiam & Tan*) for the defendants.

Cur Adv Vult A

Kamalanathan Ratnam J:

Facts

The plaintiff is the registered owner of land known as EMR 2766 Lot No 1076, Mukim Cheras ('the said property'). The defendants had paid a sum of RM18,250 to one of the directors of the plaintiff, namely, one Mr Siew Hoong Chong, towards the purchase of the said property. The plaintiff denies that there was any sale and purchase agreement executed in respect of the said property. Contending that the payment of RM18,250 was earnest money intended for the purchase of shares of the plaintiff, the plaintiff wished to refund the same but the defendants refused to accept the said sum. The defendants thus entered a caveat upon the said property.

The application

This is the plaintiff's application to remove the said caveat and for damages to be assessed and for costs.

Court's findings

What is certain is that no sale and purchase agreement has been produced in respect of the said property. I must therefore find, and I do so, that no written agreement exists. Next, I have to consider if an oral agreement exists for the sale and purchase of the said property. What has been exhibited by the plaintiff are two letters which clearly show an intention by the defendants to purchase shares in the plaintiff. The first exhibit marked 'C' in support of the plaintiff's affidavit reads as follows:

3 January 1995

Mr Loo Kok Yuen & Ta Kin Yan
No 4, Lorong Kemaris Satu
Bukit Bandaraya
59100 Kuala Lumpur

Dear Sirs

Re: Proposed Sale & Purchase of Shares in Balakong Development Sdn Bhd

We refer to the above matter.

We hereby confirm our mutual agreement to extend time until 28 February 1995 to enable the Executor and Trustee of the estate of Alvin Lee Siang Hing (deceased) to extract the Grant of Probate to the deceased's estate in order to perfect and complete the sale and purchase of the shares in Balakong Development Sdn Bhd.

In default of which, the Vendors (ie the shareholders of the company) and yourselves as the intended purchasers shall either mutually agree to sign a sale and purchase agreement for 90% of the shares in Balakong Development Sdn Bhd at RM200,000 per acre, or at the option of the intended purchasers to terminate the intended sale and purchase of the shares in Balakong

A Development Sdn Bhd, whereupon, I the undersigned, Siew Hoong Chong will immediately refund to you the sum of RM18,250 (free of interest).

Kindly signify your agreement to the terms/conditions as set out in this letter by signing on and returning to us the duplicate copy thereof for our record.

B Yours faithfully,

.....

Siew Hoong Chong

C We, Loo Kok Yuen and Ta Kin Yan hereby confirm our agreement to the terms/conditions as set out in this letter.

Sgd	Sgd
.....	.....
D Loo Kok Yuen (NRIC No 4408908)	Ta Kin Yan (NRIC No 520507-71-5355)

The second letter, marked exh D reads as follows:

3 January 1995

E Mr Loo Kok Yuen & Ta Kin Yan,
No 4, Lorong Kemaris Satu,
Bukit Bandaraya,
59100 Kuala Lumpur

Dear Sirs,

F *Re: Proposed Sale & Purchase of Shares in Balakong Development Sdn Bhd*

We refer to the above matter.

We hereby confirm our mutual agreement to extend time until 28 February 1995 to enable the Executor and Trustee of the estate of Alvin Lee Siang Hing (deceased) to extract the Grant of Probate to the deceased's
G estate in order to perfect and complete the sale and purchase of the shares in Balakong Development Sdn Bhd.

In default of which, the vendors (ie the shareholders of the company) and yourselves as the intended purchasers shall mutually agree to sign a sale and purchase agreement for 90% of the shares in Balakong Development Sdn Bhd at RM200,000 per acre, or at the option of the purchasers terminate the
H intended sale and purchase of the shares in Balakong Development Sdn Bhd., whereupon, I the undersigned, Siew Hoong Chong will immediately refund to you the sum of RM18,250 (free of interest).

Kindly signify your agreement to the terms/conditions as set out in this letter by signing on and returning to us the duplicate copy thereof for our record.

I Yours faithfully,

.....

We, Loo Kok Yuen and Ta Kin Yan hereby confirm our agreement to the terms/conditions as set out in this letter. A

Sgd

....

Loo Kok Yuen (NRIC No 4408908) | Ta Kin Yan (NRIC No 520507-71-5355) B

Even these two letters do not have all relevant signatures. In exh C the said Siew Hoong Chong has not signed the said letter, whereas in exh D the first defendant has not signed the said letter.

It is obvious that both these letters do not explain who this elusive Siew Hoong Chong is; nor did he affirm an affidavit to explain his involvement in this matter. In any case even if he was a director of the plaintiff, there is no resolution of the plaintiff before me authorizing the said Siew Hoong Chong to commit the plaintiff towards the sale of the said property. C

Whilst I agree that the plaintiff owns the said property, an agreement to purchase the shares in the company is not an agreement to purchase the said property. But in any case I do not even consider that there has been an agreement to give the defendants an interest in the said property within the meaning of s 323(1)(a) of the National Land Code 1965 ('NLC'). Even if there was to be a purchase of the shares of the company, the two letters exhibited clearly do not spell out the total purchase price either for the said property or even for the shares in the plaintiff. D E

The defendants in their affidavit in reply exhibited a letter marked 'LKY-1' signed by the said Siew Hoong Chong. The said letter reads as follows:

12 October 1994 F

I, Siew Hoong Chong, IC 2637878, acknowledge receipt of cheque No 081487 under Bank Bumiputra (M) Bhd for purchase of land Lot 1076 Mukim of Balakong. This cheque of RM18,250 is 1% advance payment only and the balance of the advance to be paid later, ie on 14 October 1994.

G

Sgd

I/C 2637878
Balakong Development Sdn Bhd

The affidavit refers to the said Siew Hoong Chong as the managing director of the plaintiff. Again there is no evidence before me that the said Siew Hoong Chong was authorized by resolution to commit the plaintiff into a sale of the said property. Be that as it may if there was indeed an intention to enter into an agreement to sell as reflected by exh LKY-1, then it is clear that there has been an abandonment of that intention by virtue of exhs C and D which now show a clear intention to purchase, not the property but the shares in the company. H I

The defendants then tendered another exhibit marked 'LKY-2'. This reads as follows:

A Your Ref: KNT/NKT/LKY/1402-95/099

Our Ref: TBE/3401/95(BH) 6 April 1995

M/s Khairuddin, Ngiam & Tan,
Advocates & Solicitors,
Lot 16.03, 16th Floor,
B Wisma Nusantara (Wisma Supreme),
Box No 18, Jalan Punchak,
Off Jalan P Ramlee,
50250 Kuala Lumpur By Fax: 2301994
and by Post

C Dear Sirs,

Re: Property held under EMR 2766 Lot 1076, Mukim Cheras
Vendor: Balakong Development Sdn Bhd
Purchasers: Loo Kok Yuen & Ta Kin Yan

We thank you for your Fax dated 5 April 1995.

D We write to advise that our Vendor clients had previously engaged M/s Kassim Tadin, Wai & Co to act for them in the above sale and purchase transaction.

We will secure a proper discharge of our clients' previous Solicitors before we proceed further. In fact, a draft Sale and Purchase Agreement has been prepared by us.

E We will revert to you shortly.

Thank you.

Yours faithfully,

F Sgd
cc client

It is clear now that even the intention to purchase the shares as shown in exhs C and D has again been abandoned by exh LKY-2 dated 6 April 1995. The parties have reverted to an intention to enter into a sale and purchase G agreement in respect of the said property and not the shares.

Now looking at exh LKY-2 I ask myself the question whether the preparation of the draft agreement by itself gives the defendants a right to enter a caveat pursuant to s 323(1)(a) of the NLC.

Where evidence disclose that the full purchase price for the property has H been paid by the purchaser to the vendor and that the vendor has executed the transfer in favour of the purchaser and has given the same to the purchaser together with the issue document of title for the land, this clearly shows that the vendor had done everything he could, as a registered proprietor, to transfer or to divest his entire interest in the land to the purchaser. In the circumstances the vendor has become a bare-trustee I holding the bare legal title to the land on trust for the purchaser who had become the beneficial owner thereof. The purchaser was therefore a bona fide purchaser for valuable consideration and an aggrieved person for

valuable consideration and entitled to make an application to the Court under s 327(1) of the NLC for the removal of the caveat lodged on the land (see *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487 (CA)). In fact in *Abdul Rahim bin Syed Mohd v Ramakrishnan Kandasamy (Wan Ahmad Azlan bin Wan Majid & Anor, Interveners) and another action* [1996] 3 MLJ 385 the court held that even a Memorandum of Understanding ('MOU') is not a legally binding document and thus the so-called purchaser referred to therein had no caveatable interest.

Further, in *Chai Kim Chong v Barnwood Sdn Bhd* [1994] 2 MLJ 56, the court held that a claim for the balance of the purchase price in a transaction is not sufficient to create a caveatable interest. The balance due was a right in personam and not a right in rem in relation to the land and the caveat entered in respect of the balance due was ordered to be removed.

I find that there was never a concluded contract for the sale of the said property in this case. There has been so many variations of their intention that this is the proverbial case of the defendants not seeing the wood for the trees. I reject the defence submission that even though the intention of purchasing the said property has changed to purchasing the shares in the plaintiff, it did not change their intention to purchase the said property.

This admission by the defendants that there was a variation in their intention stands out as a sore thumb in so far as the defendants are concerned when I note the reason given in Form 19B for the entry of the caveat which is exh B annexed to the plaintiff's affidavit in support of their application. The reason stated is as follows:

> 2 Alasan-alasan tuntutan saya ke atas tanah/kepentingan itu ialah:
>
> Kami telah membayar wang sebanyak RM18,250 kepada Balakong Development Sdn Bhd melalui pengarahnya iaitu Siew Hoong Chong sebagai pendahuluan untuk membeli tanah yang dipegang di bawah EMR 2766 Lot No 1076 Mukim Cheras di mana Balakong Development Sdn Bhd adalah tuanpunya berdaftar tanah tersebut. Siew Hoong Chong telah berjanji untuk menandatangani perjanjian jual beli tanah tersebut pada 14 Oktober 1994, namun demikian sehingga kini Siew Hoong Chong dan Syarikat Balakong Development Sdn Bhd masih tidak menandatangani perjanjian jual beli tanah tersebut dengan kami setelah ianya ditangguhkan kepada 15 Februari 1995. Kami memohon untuk memasukkan kaveat ini kerana kami percaya bahawa kami ada kepentingan terhadap tanah tersebut dan khuatir wang pendahuluan kami dilesapkan oleh Balakong Development Sdn Bhd dan pengarahnya.

On this ground alone this caveat must be removed.

Guided by the decision of the then Supreme Court in *Hew Sook Ying v Hiw Tin Hee* [1992] 2 MLJ 189 at p 197 and since I have found that the defendants do not have a caveatable interest there is no need for me to direct my mind to the existence or otherwise of any serious question to be tried arising from this claim and the issue of balance of convenience.

Delay

The other issue I ought to consider, as raised by the plaintiff, is delay. The caveat was entered on 16 March 1995. To date, the defendants have filed no action to enforce their right to claim the said property. Exactly four years have since flitted by with the defendants content with resting their case only upon a caveat. In *Tsen Kyun Tshin v Lee Tse Khiong* [1998] 4 MLJ 319 the court held that having entered a caveat to protect his interest in the land and having failed without reasonable diligence to assert his right for $7^1/_2$ years, the caveator was guilty of inordinate delay and thus removed the caveat. I therefore hold that since the defendants had failed to commence proceedings timeously to enforce what they contended to be their right, it would be totally unjust for me to permit this caveat to remain on the register, and thereby preventing the plaintiff from dealing with the said land.

Having considered all authorities submitted by both parties, I grant an order in terms of the plaintiff's application with costs.

Since there is confusion as to the actual reason the sum of RM18,250 was paid in that since I have now found that there is no evidence whether the said sum was indeed paid towards the purchase of the said property or towards the purchase of the shares, and since the plaintiff itself has indicated its intention to refund the said sum, I hereby order that the said sum be retained by the plaintiff in a fixed deposit account as of the date of this order, to accrue interest, and to be set off against the damages to be assessed and the costs to be taxed.

Plaintiff's application allowed.

Reported by Joel Ng